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IN THE

Supreme Court of the United States

October Term, 1949

No. 501

TAX COMMISSION OF THE STATE OF WASHINGTON, E. C. HUNTLEY, E. W. ANDERSON and T. S. HEDGES,
Petitioners,

vs.

WEYERHAEUSER SALES COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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The following matters are respectfully presented.

OPINIONS BELOW

The opinion of the Supreme Court of Washington on the firs appeal herein (R. 22) is reported in 30 Washington Reports, 2d Series, p. 947. The opinion of said court on the second appeal (R. 37) is not yet officially reported.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under § 1257 (3) of Title 28, United States Code, seeking review of a judgment of the highest court of the State of Washington, entered October 4, 1949 (R. 40), based on a decision of said Court entered September 3, 1949 (R. 37), wherein the validity of a particular adminstrative application of a taxing statute of the State of Washington is drawn in question on the ground of its being repugnant to the Constitution of the United States. The petition was filed on December 27, 1949.

STATEMENT OF CASE

The following is submitted for the purpose of clarification and to supply certain matters omitted in petitioner's brief.

Respondent is a wholesaler and not a manufacturer of lumber, selling in the State of Washington and elsewhere both in local and in interstate commerce (R. 29). For convenience of reference respondent's sales activities, in so far as here relevant, may be classified as follows:

Class A Activities. Local wholesale sales of lumber and other forest products to Washington customers (R. 29).

Class B Activities. Wholesale sales in interstate commerce, to Washington customers, of certain pine lumber, *not procurable in Washington* (R. 31), under contracts negotiated and made in Washington (R. 30).

Class C Activities. Wholesale sales in interstate commerce, to Washington customers, of certain pine lumber, *not procurable in Washington* (R. 31), under contracts negotiated and made elsewhere (R. 30).

In both *Class B* and *Class C Activites,* the sales contracts provided for the sale of specified sizes and grades of lumber, manufactured or to be manufactured by a specified manufacturing plant or plants in Oregon or Idaho, f. o. b. common carrier at such plants for transporation at the purchaser's expense, and title and risk of loss passed to the purchaser at the f. o. b. point (R. 30).

The facts with respect to the localization of various incidents of sale and the amounts involved in each category may be summarized as follows:

	Activities or other incidents in Washington		
	Class A Activities (R. 29)	Class B Activities (Pine lumber Sales) (R. 30, 31)	Class C Activities (Pine lumber sales) (R. 30, 31)
Solicitation of orders	Yes	Yes	No
Acceptance of orders	Yes	Yes	No
Maintenance of stock of goods	Yes	No	No
Availability of goods locally	Yes	No	No
Appropriation of goods to contract	Yes	No	No
Delivery of goods	Yes	No	No
Passage of title	Yes	No	No
Passage of risk of loss	Yes	No	No
Residence of purchaser	Yes	Yes	Yes
Collection of price	Yes	Yes	Yes
Gross sales May 1, 1945, to December 31, 1946, inclusive	$6,530,648.00	$1,919,874.96	$1,355,108.10

Respondent's pine lumber sales were made in competition with other wholesalers of lumber who manufacture in Washington the lumber which they sell at wholesale to Washington cusomers (R. 32).

Under the Washington Business and Occupation Tax (Ch. 180, Washington Laws of 1935, as amended; Remington's Revised Statutes (Supp.) § 8370-1 *et seq.*), a gross income tax is imposed upon wholesalers for the privilege of engaging in business (Id. § 8370-4), but the tax is inapplicable to manufacturing wholesalers who are subject to tax for the privilege of manufacturing (Id. § 8370-6).

The Tax Commission of the State of Washington has rule making powers (R. 27, 28). Prior to May 1, 1945, its rules (R. 28, 29) did not contemplate the taxation of respondent's *Class B* and *Class C Activities*. As of May 1, 1945, an amendment of Rule 193 was promulgated (R. 29; see R. 11-12) under which the gross income from such activities was asserted to be taxable.

Respondent sued to enjoin the collection of the tax as applied to its sales in interstate commerce (*Class B and Class C Activities*) (R. 1), and has prevailed in the Supreme Court of Washington on two occasions (R. 22, 37). In the first appeal (R. 22) it was determined in effect that the tax so applied discriminated against interstate commerce and was consequently invalid and in the second appeal (R. 37) that the principle of "the law of the case" applied.

Discrimination was found for the reason that whereas the state sought to exact a tax from the respondent for the privilege of selling at wholesale in interstate commerce, it exacted no tax from competing local wholesalers who were subject to an antecedent *ad valorem* tax for exercise of the local privilege of manufacture. (R. 22; see Petitioner's Brief, Appendix B, p. 39, at p. 45).

SUMMARY OF ARGUMENT

1. The court below has found that the tax, as here applied, discriminates against interstate commerce for the reason that respondent in its sales to Washington customers in interstate commerce is required to pay a gross income tax for the privilege of sale, whereas those who perform the same taxable act, but who manufacture in Washington, are not so

taxed. This conclusion is considered to be correct for the following reasons.

(a) The manufacturers' tax and the wholesalers' tax are levied for different and unrelated privileges and have a different measure, the former *ad valorem* and the latter unapportioned gross sales. The Supreme Court of Washington has held these privileges to be distinct for purposes of classification, and they are required to be distinct (under the doctrine of *American Manufacturing Co. v. St. Louis,* 250 U. S. 459) in order to save the constitutionality of the manufacturers' tax. In terms of legal analysis, the determination of discrimination is therefore correct.

(b) The conclusion is also correct in terms of economic analysis. Depending on the analytical approach, manufacturing and selling may be taken to be discrete activities or as parts of a single integrated process. If they are treated as discrete, discrimination conclusively appears. If (in keeping with the premises of petitioner's legal analysis) manufacturing and selling are taken to be integrated, then any comparison of the competitive position of the Washington manufacturing-wholesaler and the respondent, as a non-manufacturing-wholesaler in interstate commerce, requires consideration of all the antecedent tax burdens, *ad valorem* and otherwise, actually or potentially inhering in respondent's cost of goods. It has been held that the potentiality of discrimination in this area will be decisive against the tax (*Freeman v. Hewit,* 329 U. S. 249) and that a court is not justified in making a determination on the basis of the temporary and shifting incidence of state taxation. The tax therefore offends the Commerce Clause.

2. The tax as here applied offends the Commerce Clause for reasons other than those assigned by the court below.

The vice in the tax is that it is an unapportioned tax on the gross receipts of interstate commerce, an exaction recognized to be invalid since *Fargo v. Hart,* 193 U. S. 490. Respondent has paid all taxes in respect of its local Washington sales. The conduct of a local business (for the privilege of engaging in which respondent has paid in full) will not justify a tax upon the unapportioned gross receipts of that part of respondent's business which is exclusively in interstate commerce.

3. The reasons assigned for the allowance of the writ appear inadequate in view of the apparent invalidity of the tax in its present application. The cases chiefly relied upon by the petitioner (*Allied Mills v. Department of Treasury,* 318 U. S. 700, and *International Harvester Co. v. Department of Treasury,* 322 U. S. 340) do not involve the element of discrimination (inherent in the tax statute and the administrative practice) which constituted the basis of decision below. On the broader question of invalidity (not involved in the decision below) such cases have some equivocal relevance, but in view of their facts, and later statements in *Freeman v. Hewitt, supra,* they are considered to be inapplicable. They are particularly inapplicable because in the instant cases the subject matter of the sales herein in question was goods *not procurable in Washington.* The instant case is therefore not one in which the taxpayer was in a position to choose between local deliveries from local stocks and out of state delivery at some f. o. b. point, and chose the former, for reasons of convenience, a circumstance emphasized in the *International Harvester* case.

ARGUMENT

1. Analysis of the Statute.

The Washington Business and Occupation Tax (Ch. 180, Washington Laws of 1935, as amended; Remington's Revised Statutes (Supp.) § 8370-1 *et seq.*) imposes a tax upon every person, including corporations, "for the act or privilege of engaging in business activities" (See Sec. 4; Remington, § 8370-4) measured as follows:

(a) upon extractors, ¼% of "the value of the products extracted for sale or commercial use;"

(b) upon manufacturers, ¼% of "the value of the products manufactured;"

(c) upon retailers, ¼% of "the gross proceeds of sales of the business";

(d) upon certain grain wholesalers, 1/100% of the "gross proceeds derived from such sales";

(e) upon all others "engaging within this state in the business of making sales at wholesale" ¼% of "the gross proceeds of sales of such business;"

(f) upon publishers and highway contractors, ¼% of "the gross income of the business;"

(g) upon all others, ½% of "the gross income of the business."

In the case of extractors and manufacturers the measure is *ad valorem,* although "value of the products" is taken to be the equivalent of sale price except where there is no sale or where proceeds of sale "are not indicative of true value" (See Sec. 7; Remington, § 8370-7). In the case of wholesalers and retailers the measure is gross sales and in all other cases

gross receipts. The rates vary, although manufacturers and wholesalers take the same rate (¼%) applicable in the former case to the *ad valorem* measure and in the latter case to "gross proceeds of sales."

Under Sec. 6 of the Act (Remington, § 8370-6) by reason of an amendment, (Washington Laws of 1943, Ch. 156, Sec. 3) any wholesaler (other than a grain wholesaler) who is taxable as an extractor or a manufacturer, and is thus subject to the *ad valorem* tax for extraction or manufacture, is not taxable as a wholesaler.

Sec. 12 of the Act (Remington, § 8370-12) requires deduction from the tax measure of

> "(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States."

Section 187 of the Act (Remington, § 8370-187) prescribes a registration procedure and provides that every person who engages in any business or performs any act for which a tax is imposed shall, whether taxable or not, "apply for and obtain from the commission [the state tax commission] upon the payment of a fee of one dollar, a registration certificate," and that "no person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section."

Section 207 of the Act (Remington, § 8370-207) provides that "it shall be unlawful for any person to engage in business without having obtained a certificate of registration as provided herein; or to engage in business after his certificate of registration shall have been revoked by order of the tax commission." Violation is a gross misdemeanor.

Under Section 202 of the Act (Remington, § 8370-202) taxes are collectible by warrant, and if any warrant is not paid the tax commission may "revoke the certificate of registration of the taxpayer against whom the said warrant was issued"

The tax is in terms, in incidence, and in effect a tax "for the act or privilege of engaging in business activity" and has been held to be such in

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650.

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90.

and by necessary inference in

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434.

As applied to extraction and manufacture it is a tax upon a local privilege with an *ad valorem* measure valid under *American Manufacturing Co. v. St. Louis,* 250 U. S. 459. As to all other matters it is a tax on a privilege, which, depending on the circumstances, may or may not be local, and the measure is unapportioned gross receipts.

The evident purpose of the statute is to levy an excise on all manner of business activities. Since the same person could be taxed for the privilege of manufacturing and also for the privilege of selling (and was so taxable prior to the 1943 amendment) the effect of § 8370-6 is to exempt the local manufacturing wholesaler from tax for the privilege of wholesaling.

2. The Tax As Here Applied Discriminates Against Interstate Commerce.

The nature and consequences of the discrimination have been stated by the court below as follows:

> "* * * *, the statute marks a discrimination against interstate commerce in levying a tax upon wholesale activities of those engaged in interstate commerce, which tax is, because of the exemption contained in § 8370-6, not levied upon those who perform the same taxable act, but who manufacture in the state of Washington. The statute is therefore violative of the commerce clause of the Federal Constitution and is invalid."

(This appears in the first opinion in the companion case of *Columbia Steel Co. v. State of Washington* (Petitioner's Brief, Appendix B, p. 39) adopted as the basis of decision in the first appeal herein (R. 22).

In its discussion of discrimination the State subsumes both the manufacturers' tax and the wholesalers' tax under the general head of taxes on gross income and erroneously treats them as identical (Petitioner's Brief, 16-19). At the same time it presses an economic argument based on the inconsistent premise that the two taxes are distinct (Petitioner's Brief, 19 *et seq.*)

These taxes are levied for different and unrelated privileges, the local privilege of manufacture, on the one hand, and the privilege of selling at wholesale on the other hand. They have been held to be distinct for purposes of classification:

> *Drury the Tailor v. Jenner*, 12 Wn. (2d) 508, 122 P. (2d) 493

and see also:

State ex rel Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91 .

Supply Laundry Co. v. Jenner, 178 Wash. 72, 34 P. (2d) 363

They are required to be distinct to save the constitutionality of the manufacturer's tax which is self-evidently drawn to utilize the rule of *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, without colliding with the doctrine (settled since *Fargo v. Hart,* 193 U. S. 490) that the unapportioned gross receipts of interstate commerce are not a proper subject of state taxation. *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292; *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307; *Freeman v. Hewit,* 329 U. S. 249. In terms of legal analysis payment of the manufacturer's tax is as lacking in relevance to the privilege of wholesaling as the payment of any other tax with an *ad valorem* tax measure. The distinction has been emphasized in *Freeman v. Hewit,* supra, wherein it was said:

> "That tax [the manufacturers' excise of *American Mfg. Co. v. St. Louis*] then, unlike this [the seller's excise of *Freeman v. Hewit*], was not in fact a tax on gross receipts."

It is submitted therefore that the charge of discrimination is not answered by the claim that the two taxes are or may be equivalent in ultimate dollar amount. The respondent should not be taxed for the privilege of selling in interstate commerce in competition with local manufacturing wholesalers who are not taxed for the privilege of selling in local commerce.

The State argues, by way of confession and avoidance, that the competing wholesalers are subject to equivalent dollar burdens (in the State of Washington) and that parity is thereby achieved. It is said that the local manufacturing wholesaler is subject to an antecedent *ad valorem* tax attaching to the privilege of manufacture, and that the resulting economic burden is equivalent to that proposed for the respondent. Equivalence is said to result from the fact that the rate is the same (¼%) and that "value of the products manufactured" is usually [although not necessarily] the same as the "gross proceeds of sales" of the wholesaler.

This argument gives full effect to the antecedent tax burdens of the local manufacturing wholesaler and conveniently ignores all antecedent tax burdens which actually or potentially inhere in respondent's costs of goods sold. Specifically it ignores the potential economic burden of a manufacturer's tax in the state of origin under *American Manufacturing Co. v. St. Louis,* 250 U. S. 459, or a gross income exaction on the terminal sale in the state of origin under *Department of Treasury v. Wood Preserving Corporation,* 313 U. S. 62, as well as conventional *ad valorem* and other exactions.

Analytically the steps in the process of production and distribution may be treated either as discrete or as integrated, but they may not be treated as both in the same analysis. If they are treated as discrete (that is, if manufacturing is analytically distinct from sale) discrimination conclusively appears. If they are treated as integrated, the position of competing wholesalers can be assessed only in terms of the total economic burdens, actual and potential,

which attach to each in the course of the integrated process. Having adopted integration for purposes of local analysis, the State cannot properly reject integration for purposes of interstate analysis. Hence no fair appraisal of respondent's competitive position is possible without taking account of every element of pyramided tax liability attaching to the goods, actually or potentially, at the time of sale. Without this petitioner's argument fails for infirmities of analytical method. If the analysis were correctly pursued, it would appear that respondent's goods enter the State of Washington in interstate commerce freighted with actual or potential antecedent tax burdens equal to or greater than those sustained by the local manufacturing wholesaler who is exempted from the tax on wholesalers.

Although a minute examination of every transaction at the moment of sale might eventuate in a correct conclusion as to comparative burdens, this Court has stated that such an examination will not be made.

It is said:

> "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various states at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce;"

and further;

> "* * * that, for the time being only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated." *Freeman v. Hewit, supra.*

Under this view it is immaterial what taxes have at a particular moment been levied in the state of origin, since potential exercise of the power rather than actual exercise is the controlling consideration. It appears, therefore, that the petitioner's argument of economic equality, aside from its spurious analytical method, represents a bootless inquiry. The imminence and potentiality of discriminatory burden invalidate the tax.

3. The Tax As Here Applied Offends the Commerce Clause For Reasons Other Than Those Assigned By the Court Below.

In the area of sales, use and gross receipts taxes this Court has had occasion to uphold taxes levied in respect of activities prefatory to interstate commerce,* and also to uphold taxes levied in respect of activities at or subsequent to the termination of interstate commerce. ** However such taxes have

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* (e. g.) **American Manufacturing Co. v. St. Louis,** 250 U. S. 459 (manufacturer's excise); **Oliver Iron Mining Co. v. Lord,** 262 U. S. 172 (excise on extraction of natural resources); **Coverdale v. Arkansas-Louisiana Pipeline Co.,** 303 U. S. 604 (excise on production of power for interstate transportation); **Utah Power & Light Co. v. Pfost,** 286 U. S. 165 (excise on generation of electricity); **Western Livestock v. Bureau of Revenue,** 303 U. S. 250 (excise on publication of newspaper measured by gross receipts from advertising); **Department of Treasury v. Wood Preserving Corp.,** 313 U. S. 62 (gross receipts tax on sales of goods consumated by local delivery but destined for interstate transportation).

** (e. g.) **use taxes: Henneford v. Silas Mason Co.,** 300 U. S. 577; **Felt & Tarrant Manufacturing Co. v. Gallagher,** 306 U. S. 62; **Southern Pacific Co. v. Gallagher,** 306 U. S. 167; **Nelson v. Sears, Roebuck & Co.,** 312 U. S. 359; **General Trading Co. v. State Tax Commission,** 322 U. S. 335; **consumption taxes in respect of sales made to local buyers in interstate commerce, where deliveries of goods are made within the state, McGoldrick v. Berwind-White Coal Mining Co.,** 309 U. S. 33; **McGoldrick v. Felt & Tarrant Mfg. Co.,** 309 U. S. 70; **gross receipts taxes levied in respect of proceeds of sales under similar circumstances, Allied Mills Inc. v. Department of Treasury,** 318 U. S. 740; **International Harvester Co. v. Department of Treasury,** 322 U. S. 340.

been held invalid under the Commerce Clause where they directly burden interstate commerce, (e. g.)

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (Washington Business and Occupation Tax as applied to broadcasting and measured by gross receipts);

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (Same as applied to business of stevedoring and measured by gross receipts);

J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307 (Indiana gross income tax on sales in interstate commerce);

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (Washington Business and Occupation Tax as applied to fruit brokerage and measured by gross receipts);

Freeman v. Hewit, 329 U. S. 249 (Indiana gross income tax on sales in interstate commerce);

McLeod v. J. E. Dilworth Co., 322 U. S. 327 (Sales tax in the state of the buyer in respect of sales in interstate commerce);

Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (New York privilege tax measured by gross receipts).

The exaction in the instant case presents no issue not implicitly decided in the foregoing and prior cases.

It has been settled since *Fargo v. Hart,* 193 U. S. 490, that an unapportioned tax on the gross receipts of interstate commerce is invalid and this doctrine has been convincingly reaffirmed in *Crew Levick Co. v. Pennsylvania,* 245 U. S. 229 and *Freeman v. Hewit,* 329 U. S. 249, as well as elsewhere.

Aside from the obvious vice of actual discrimination, discussed *ante,* the vice in the proposed tax is that it is an unapportioned tax on gross receipts exacted for the privilege of conducting activities in interstate commerce. The fact that respondent exercises local privileges (it's *Class A Activities*) for which it pays in full, is not a justification for an unapportioned tax on activities exclusively in interstate commerce, (e.g.) respondent's *Class C Activities,* where petitioner would tax the entire gross receipts on the sole ground that the customer resides in Washington and pays the purchase price there.

4. The Reasons Assigned For Allowance of the Writ Appear Inadequate.

A. The court below has found that the petitioner's administrative policy discriminates against interstate commerce. The nature and reality of the discrimination appear to be clear. The consequences of discrimination are well settled by the decisions of this Court.

B. No general issue of the constitutionality of the Business and Occupation tax is presented. The issue relates only to a particular administrative interpretation, the vice in which may be cured if petitioner recedes to the position which it occupied prior to the promulgation of its rules of May 1, 1945.

C. The cases of *Allied Mills v. Department of Treasury,* 318 U. S. 740 and *International Harvester Co. v. Department of Treasury,* 322 U. S. 340, involved no administrative discrimination analogous to that considered by the court below and are not in point. The instant case is fully dis-

posed of on the basis of statutory and administrative discrimination.

D. Concerning the broader grounds on which the tax may be invalidated (not necessary to the decision below), the relevance of the cases relied upon by petitioner is difficult to appraise because their facts are not wholly clear. It appears that both the *Allied Mills* and *International Harvester* cases involved deliveries of goods by the seller in the taxing state (taxable under the doctrine of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 70), or if not, that the seller was in a position to make deliveries out of local stocks and chose delivery at some out-of-state f.o.b. point for reasons of convenience to the seller. The opinion in the *International Harvester* case emphasizes the point that no showing was made that the goods "could be obtained only outside Indiana" (322 U. S. 340, 343, n. 3). In *Freeman v. Hewit*, 329 U. S. 249, it was stated that the tax sustained in the *International Harvester* case was "a tax on the transfer of property within the state [of Indiana]." In the case at bar the sales in question were wholly of pine lumber, none of which *"was obtainable or could have been procured by plaintiff* [respondent] *in said state"* (R. 31) [of Washington] (Italics supplied). It thus appears that the cases relied upon by petitioner are in the line of authority of *Berwind-White*, which is not applicable here in view of *McLeod v. J. E. Dillworth Co.*, 322 U. S. 327 and *Freeman v. Hewit*, 329 U. S. 249, or if they stand for more, that they are inapplicable because in the case at bar the goods sold to Washington customers were not locally procurable.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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